STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 2, 2010
v	No. 287418 Kent Circuit Court
GREGORY ALAN RUDOLPH, Defendant-Appellant.	LC No. 07-003362-FC

Before: Stephens, P.J., and Gleicher and M.J. Kelly, JJ.

PER CURIAM.

A jury convicted defendant of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to life imprisonment without parole for the murder conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant challenges on appeal only the trial court's ruling to exclude expert psychological testimony that he contends would have had relevance toward proving his provocation at the time of the victim's shooting, thus reducing his culpability for the shooting. Defendant insists that the trial court's refusal to admit his proffered expert testimony deprived him of his constitutional right to present a defense. We review for an abuse of discretion a trial court's decision whether to admit expert testimony. *People v Smith*, 425 Mich 98, 105-106; 387 NW2d 814 (1986). "This Court . . . reviews de novo the constitutional question whether a defendant was denied h[is] constitutional right to present a defense." *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

A defendant has a right under the state and federal constitutions, Const 1963, art 1, § 13, 20; US Const, Ams VI, XIV, to present a defense and call witnesses in his defense. *People v Whitfield*, 425 Mich 116, 124-125 n 1; 388 NW2d 206 (1986). "Although the right to present a defense is a fundamental element of due process, it is not an absolute right." *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984). Rather, the right to confront witnesses and present a defense extends only to relevant and admissible evidence. *People v Hackett*, 421 Mich 338, 354; 365 NW2d 120 (1984). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. An expert possessing specialized knowledge may offer testimony concerning his field of expertise if the following

three prerequisites exist: "(1) the witness must be an expert; (2) there must be facts in evidence which require or are subject to expert analysis; and (3) the knowledge of the expert must be in a field where knowledge belongs more to experts than to the common man." *People v Beckley*, 161 Mich App 120, 124-125; 409 NW2d 759 (1987), aff'd 434 Mich 691; 456 NW2d 391 (1990), citing MRE 702. "Generally, the testimony must assist the jury in understanding the evidence or the factual issues, and the witness must have sufficient qualifications 'as to make it appear that his opinion or inference will probably aid the trier in the search for truth.'" *Smith*, 425 Mich at 106, quoting McCormick, Evidence (3d ed), § 13, p 33.

Defendant did not dispute that in March 2007 he shot the victim repeatedly in a residence where they cohabited. The victim and defendant shared an intimate relationship that had many breaks and reunions over the course of its three-year duration. The defense hoped to demonstrate at trial that defendant behaved with some level of provocation when he fired five bullets into the victim. The defense specifically intended to call as an expert witness psychologist Dr. Daniel Rosen, who performed an independent evaluation of defendant before trial. The prosecutor filed a motion in limine seeking to preclude Dr. Rosen's testimony, which the prosecutor characterized as embodying a diminished capacity defense not cognizable under Michigan law. The prosecutor added that defendant himself could testify concerning the alleged provocation, and that the jury remained capable of deciding this question of fact. Defendant responded that Dr. Rosen's testimony would have high probative value toward establishing that defendant did not premeditate and deliberate the shooting, but that he committed the murder in a "heat of passion," which would reduce his culpability to guilt of voluntary manslaughter. The trial court ruled Dr. Rosen's proffered expertise inadmissible, explaining as follows:

> . . . I understand the argument being made by the defense. They weren't arguing that this psychiatric testimony be permitted for purpose of diminished capacity, but for other issues they felt would properly be allowed.
>
> Respectfully, however, the Court disagrees, and I adopt the reasoning . . . of the People in its motion as to the use of psychiatric testimony. I'm satisfied, after review of the authority, including *People v Sullivan*, 231 Mich App 510[; 586 NW2d 578 (1998), aff'd 461 Mich 992 (2000),] and perhaps even more importantly, *People v Carpenter*, 464 Mich 223[; 627 NW2d 276 (2001)], clearly the introduction of expert testimony regarding the defendant's mental state cannot be used to diminish criminal responsibility, outside the context of legal insanity, and I believe that, similarly, such evidence relative to defendant's special traits, including mental disorders, may not be considered in determining the adequacy of provocation necessary to invoke the heat of passion defense.
>
> The key here, I think, is that the jury is well able, as individuals, to determine the objective standard relative to whether a reasonable person would be adequately provoked, and the Court's satisfied here that the requested psychiatric testimony would neither be helpful nor allowed under those circumstances.

In *Sullivan*, 231 Mich App at 518-520, this Court held that a defendant's special and particular mental traits or mental disturbances had no relevance to the issue of provocation.

> The provocation necessary to mitigate a homicide from murder to manslaughter is that which causes the defendant to act out of passion rather than reason. Case law has consistently held that the provocation must be adequate, namely that which would cause a *reasonable person* to lose control. [Emphasis in original.]
>
> The determination of what is reasonable provocation is a question of fact for the factfinder. . . . Where, as a matter of law, no reasonable jury could find that the provocation was adequate, the court may exclude evidence of the provocation.
>
> The trial court refused to instruct regarding voluntary manslaughter, concluding that no reasonable jury could find that the provocation was adequate to cause a reasonable person to act out of passion. Defendant does not dispute the court's finding. *Defendant argued, however, that he is not a reasonable person and that the jury should be entitled to take his weakness of mind into account in determining the adequacy of the provocation*. [Emphasis added.]
>
> The common law measures provocation under a reasonable person standard. According to this rule, provocation is adequate only if it is so severe or extreme as to provoke a reasonable man to commit the act. Thus, it is quite uniformly held that a defendant's special mental qualities are not to be considered in measuring the adequacy of provocation.
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> *Case law in Michigan, which has also looked to the common law for the definition of manslaughter, requires that the provocation be sufficient to excite passion in a "reasonable man." . . . Thus, by definition, any special traits of the particular defendant cannot be considered. The fact that defendant may have had some mental disturbance is not relevant to the question of provocation*. [Emphasis added]. [*Id*. at 518-520 (citations omitted).]

Consistent with the principles discussed in *Sullivan*, we conclude that the trial court correctly found that any particular psychological defects of defendant, which Dr. Rosen's proffered testimony would have substantiated, had no relevance to the question whether defendant operated under provocation at the time he shot the victim. Consequently, the trial court did not abuse its discretion when it ruled Dr. Rosen's testimony inadmissible. *Smith*, 425 Mich at 105-106; *Sullivan*, 231 Mich App at 518.[1]

[1] We find unpersuasive defendant's argument that the decision in *People v Yost*, 278 Mich App 341; 749 NW2d 753 (2008), dictates that the trial court should have admitted Dr. Rosen's expert testimony under the circumstances of this case. In *Yost*, we concluded that the "defendant could present evidence of her limited intellectual capabilities if offered for a *relevant* purpose other than to negate the specific intent element of the charged crimes." *Id*. at 355 (emphasis added). However, as set forth above, "[t]he fact that defendant may have had some mental disturbance is not *relevant* to the question of provocation." *Sullivan, supra* at 519-520 (emphasis added). Because defendant offered Dr. Rosen's testimony for the purposes of negating the specific intent

(continued…)

Furthermore, our review of the trial record leaves us unpersuaded that the trial court's decision to exclude testimony by Dr. Rosen operated to deprive defendant of his constitutional right to present the defense that he acted under provocation when he killed the victim. Defendant testified at length and in detail at trial with respect to the nature of his relationship with the victim, the problems in the relationship, and the impact the relationship problems had on his mental status. The prosecutor also played for the jury a recorded statement defendant gave to the police shortly after the killing, in which defendant revealed a similar, though more abbreviated, relationship history and discussion of his mental stresses. Because the reasonable person standard is a matter within the knowledge of the common man, the trial court correctly left for the jury a determination whether defendant's version of events warranted a finding that he acted with provocation in killing the victim. *Sullivan*, 231 Mich App at 518.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly

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element of premeditated murder and proving provocation, it simply was not relevant to these issues, and thus inadmissible. *Id*.; *Yost*, 278 Mich App at 355.